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Hon. Robert Young
Chief Justice
Michigan Supreme Court
3034 W Grand Blvd Ste 8-500
Detroit, MI 48202

Re: Administrative File 2010-13

Dear Chief Justice Young and Justices of the Court:

I have read the comments posted thus far regarding the proposed amendment to MCR 6.001 with interest; almost all, it seems to me, begin with a fundamentally false premise, and that is that MCR 6.201, the discovery rule, *currently* applies in district court before the preliminary examination. Among the comments are complaints that the proposal "eliminates the right to discovery at preliminary examinations," "bars [discovery] pre-exam in felony cases," "cuts off the right to defense discovery prior to a preliminary examination in a criminal case," and the like. But by its plain text MCR 6.201 does not apply *currently* either to preliminary examinations or to misdemeanors. This does not mean district courts do not have discretion to order a *limited* sort of discovery, if necessary, before a preliminary examination, it simply means that MCR 6.201 is not the source of that authority.

Concerning the coverage of the rules in subchapters 6.000-6.500, MCR 6.001 currently provides:

> (A) Felony Cases. The rules in subchapters 6.000-6.500 govern matters of procedure *in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction*.
>
> (B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.106, 6.125, 6.427, 6.445(A)-(G), and the rules in subchapters 6.600-6.800 govern matters of procedure in criminal cases cognizable in the district courts.

Plainly, MCR 6.201 does not apply in misdemeanor cases—it is not listed in subparagraph (B) as one of those rules that "govern matters of procedure in criminal cases cognizable in the district courts." Nor is it applicable before preliminary examinations. The rules in subchapters 6.000-6.500 govern matters of procedure "*in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction*." Felony cases are not cognizable in the district courts. District courts have no jurisdiction over felony cases other than the limited role of determining whether they should proceed to the court—the circuit court—where they *are* cognizable. The proposed amendment adding "and are applicable after indictment or information and shall not be operative before or during any preliminary hearing" is simply language of emphasis, dispelling any possible ambiguity on the point.

If this is not enough, the very text of MCR 6.201 makes the point. First, simply its breadth reveals it is not intended for other than circuit court proceedings. On request, each side must provide a witness list (which may be amended "no later than 28 days *before trial*," the rule clearly contemplating discovery in the circuit court); written or recorded statements that a party intends to call at trial (except the defense does not have to disclose any statement by the defendant); the curriculum vitae of an expert the party may call, and either a report from that expert, or a written description of the of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion; any criminal record that the party may use at trial to impeach a witness; a description or list of criminal convictions, known to the defense attorney or prosecuting attorney, of any witness whom the party may call at trial; and so on. It is painfully obvious that the rule does not contemplate that all this be done before the preliminary examination—but if MCR 6.201 is applicable at the preliminary examination, a request by a party triggers *all* these disclosures.

The capstone is MCR 6.201(F), Timing of Discovery. "Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule *within 21 days of a request* under this rule and a defendant must comply with the requirements of this rule *within 21 days of a request* under this rule." The preliminary examination is scheduled within 14 days of the arraignment on the warrant, so that compliance with MCR 6.201 would not be required as a matter of the rule itself. This is because the rule is a "trial rule," a "circuit court rule," not designed for preliminary examinations, and, under MCR 6.001 and MCR 6.201, not *currently* applicable to preliminary examinations (and also not to misdemeanor cases, which is undeniable under MCR 6.001(B)).

This is not to say that no discovery can occur in the district courts before misdemeanor trials. Though under MCR 6.001(B), MCR 6.201 is not applicable to misdemeanor cases, and there is no other *court rule* source for discovery in misdemeanor cases, I am quite sure that district judges order and supervise discovery of some sort in misdemeanor cases all the time. Similarly, though MCR 6.201 provides no source of authority for discovery before a preliminary examination, that a district judge can exercise his or her discretion, if needs be, concerning reasonable limited discovery before a preliminary examination, taking into account the limited purpose of a preliminary examination, also seems undoubtable to me.

The proposal *changes* nothing, serving only as a point of emphasis or clarification. Perhaps there *should* be some sort of rule for both limited discovery before a preliminary examination, and for discovery before misdemeanor trials. But that is a different conversation.

I thank the justices for their consideration of my remarks.

Very truly yours,

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